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MERCK KGaA v. LENO MARKETING (M) SDN BHD; REGISTRAR OF TRADE MARKS (INTERESTED PARTY)

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF CJ
ZULKEFLI MAKINUDIN PCA
B RAMLY ALI FCJ
ZAHARAH IBRAHIM FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEAL NO: 01(f)-9-04-2017(W)]
7 MAY 2018
C [2018] CLJ (JT4)

TRADE MARKS: *Registration – Opposition to registration – Dismissal of opposition by Registrar of Trade Marks ('Registrar') – Appeal to High Court and further appeal to Court of Appeal – Whether High Court exercising its original or*
D *appellate jurisdiction – Whether matter ought to end at Court of Appeal – Whether aggrieved party has right to appeal to Federal Court – Whether appeal lay outside scope of s. 96 of Courts of Judicature Act 1964 – Trade Marks Act 1976, ss. 28, 67, 69*

CIVIL PROCEDURE: *Appeal – Appeal to Federal Court – Right to appeal –*
E *Whether judgment or order of Court of Appeal appealable to Federal Court – Matter originated from Registrar of Trade Marks ('Registrar') – Whether appeal to High Court a rehearing of original cause before Registrar – Whether High Court exercising its original or appellate jurisdiction in appeal from Registrar – Whether nature of High Court's role under s. 28 of Trade Marks Act 1976 had characteristics*
F *of original jurisdiction – Whether matter ought to end at Court of Appeal – Whether aggrieved party has right to appeal to Federal Court – Whether appeal came within ambit of s. 96(a) of Courts of Judicature Act 1964 – Trade Marks Act 1976, ss. 67 & 69*

WORDS & PHRASES: *'appeal' – Trade Marks Act 1976, s. 28 – Hearing before*
G *High Court arising from decision of Registrar of Trade Marks – Whether consistent with substantive nature of appellate jurisdiction exercised by High Court*

The appellant, an international pharmaceutical company, was the registered owner of the trade marks 'BION' and 'BION 3' in Classes 5, 29 & 30. The
H respondent applied to register the trade mark 'Bionel' in Class 5 for, *inter alia*, goods of pharmaceutical and sanitary substance. The Registrar of Trade Marks ('the Registrar') accepted the respondent's application. Upon the publication of the respondent's application in the *Gazette*, the appellant filed a notice of opposition before the Registrar under s. 28 of the Trade Marks Act 1976 ('the TMA'). The main grounds of the appellant's opposition were
I that the respondent's mark was confusingly or deceptively similar to the

appellant's mark, and that the registration would likely deceive or cause confusion amongst the public. Having heard the parties, the Registrar dismissed the appellant's opposition and accordingly registered the respondent's trade mark. The appellant appealed against the decision of the Registrar to the High Court pursuant to ss. 28(5) and 28(6) of the TMA. The High Court agreed with the findings of the Registrar and dismissed the appellant's appeal. Dissatisfied, the appellant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal, noting the concurrent findings of the High Court and the Registrar. Leave to appeal was granted to the appellant by this court on several questions of law. At the hearing of the appeal, however, the respondent raised a preliminary objection that the present appeal was not competent. It was the respondent's submission that s. 96 of the Courts of Judicature Act 1964 limits the appellate jurisdiction of the Federal Court to matters decided by the High Court in the exercise of its original jurisdiction. The respondent further contended that the TMA confers appellate jurisdiction on the High Court, with an appeal procedure as provided for in O. 55A of the Rules of Court 2012 ('RC'). Thus, it was argued by the respondent that since the present appeal did not emanate from a decision of the High Court in its original jurisdiction, the appeal lay outside the scope of s. 96 of the CJA and must be dismissed *in limine.* In response, the appellant submitted that the High Court deciding on an appeal from the decision of the Registrar is exercising its original jurisdiction. The crux of the appellant's contention was that the term 'appeal' in the TMA was not conclusive of the nature of the legal proceedings; rather, it was the substantive provisions of the statute that were determinative. The appellant thus submitted that the present appeal was competent. The main issue that arose for determination was whether the High Court, in exercising its powers under s. 28(5), (6) and (7) of the TMA, was acting in its original jurisdiction or appellate jurisdiction.

Held (dismissing appeal with costs)
Per Md Raus Sharif CJ delivering the judgment of the court:

(1) The issue in the present case was not whether a party aggrieved by the decision of an administrative or inferior tribunal has a right to appeal at all; the question was whether the aggrieved party has the right to appeal all the way up to the Federal Court. It is trite that the right of appeal is a creature of statute; 'unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies.' It is in the interest of the parties and the community as a whole that there must be some limit to litigation. The levels of appeal available to an aggrieved party in a particular case represents the balance between the competing requirements of justice in determining the dispute and finality in litigation. (paras 17-20)

(2) Section 96(a) stipulates a number of discrete conditions for a judgment or order of the Court of Appeal to be appealable to the Federal Court *ie*, that the High Court must have decided the cause or matter 'in the exercise of its original jurisdiction.' Where the relevant statute is silent as to the right of appeal to the Federal Court, if the matter was decided by the High Court in its appellate jurisdiction, the matter ends at the Court of Appeal and no further appeal lies to the Federal Court. (paras 33-35)

(3) The nature of the jurisdiction exercised by the High Court in determining appeals from tribunals must be determined by reference to the relevant statute itself. The High Court's jurisdiction depends on the nature of the judicial function it exercises. The opposition proceedings before the Registrar were brought by the appellant pursuant to s. 28 of the TMA. Subsections 28(5), (6) and (7) of the TMA provide for the right and manner of appeal to the High Court. In hearing an appeal from the decision of the Registrar under s. 28, the High Court does not take cognisance of the matter and determine the dispute at the first instance. On the contrary, the provisions of s. 28 indicate that the appeal to the High Court was a rehearing of the original cause before the Registrar. The High Court was empowered to examine the merits of the case, correct errors in the Registrar's decision and make such orders as ought to have been made at first instance. (paras 71-75)

(4) Significantly, under s. 28(7) of the TMA, the parties may not introduce further materials or additional grounds of objection, not previously raised in the proceedings before the Registrar, on appeal to the High Court without the court's leave. These restrictions strongly indicate that the appeal before the High Court is a continuation of the opposition proceedings, where the role of the High Court is to determine the correctness of the Registrar's decision based primarily on the materials and grounds then available before the Registrar. (para 76)

(5) The fact that s. 69 of the TMA confers upon the High Court the same discretionary powers as the Registrar in determining the appeal is entirely consistent with its appellate jurisdiction. Further, in hearing an appeal from the decision of the Registrar, the High Court exercising the powers of the Registrar pursuant to s. 67 of the TMA would be acting within its appellate jurisdiction. The High Court's exercise of the s. 67 powers is incidental to, and intertwined with, the appeal so as to constitute part of the appellate jurisdiction. The nature of the High Court's role under s. 28 of the TMA did not have the characteristics of original jurisdiction, but conversely displayed the hallmarks of appellate jurisdiction. (paras 77-79)

(6) It is well-established that the words used in a statute best declare the intention of Parliament; where the words are unambiguous, the court is bound to give effect to them. The word 'appeal' is consistently used in the TMA to describe the hearing before the High Court arising from the decision of the Registrar. On a plain and natural reading, the reference to 'appeal' tends to indicate that the nature of the hearing before the High Court is an exercise of its appellate jurisdiction. To read the word 'appeal' to mean not an appeal in the natural sense, but in fact an exercise of the court's original jurisdiction, was an unduly strained construction. In the context of the TMA, the plain meaning of the word 'appeal' is consistent with the substantive nature of the appellate jurisdiction exercised by the High Court under s. 28. (paras 80, 83 & 93)

(7) Based on the court's analysis of the nature of the High Court's jurisdiction under s. 28 of the TMA, supported by a plain and natural reading of the statutory language, the High Court was exercising its appellate jurisdiction in hearing an appeal from the decision of the Registrar under s. 28 of the TMA. Since the matter herein was not decided by the High Court in the exercise of its original jurisdiction, the present appeal did not meet the statutory condition for an appeal to this court under s. 96(a) of the CJA. The matter ended at the Court of Appeal and no further appeal lay to this court. (paras 95 & 96)

Bahasa Malaysia *Headnotes*

Perayu, sebuah syarikat farmaseutikal antarabangsa, adalah pemilik berdaftar cap dagangan 'BION' dan 'BION 3' dalam Kelas 5, 29 dan 30. Responden memohon untuk mendaftarkan cap dagangan 'Bionel' dalam Kelas 5 untuk, antara lain, barangan farmaseutikal dan sanitari. Pendaftar Cap Dagangan ('Pendaftar') menerima permohonan responden. Apabila permohonan responden diterbitkan dalam *Warta*, perayu memfailkan notis bantahan di hadapan Pendaftar bawah s. 28 Akta Cap Dagangan 1976 ('ACP'). Hujahan-hujahan utama bantahan perayu adalah bahawa cap responden, secara mengelirukan dan memperdayakan, serupa dengan cap perayu, dan pendaftaran itu akan menipu dan menimbulkan kekeliruan awam. Apabila mendengar pihak-pihak terlibat, Pendaftar menolak bantahan perayu dan seterusnya mendaftarkan cap dagangan responden. Perayu merayu terhadap keputusan Pendaftar Mahkamah Tinggi menurut ss. 28(5) dan 28(6) ACP. Mahkamah Tinggi bersetuju dengan dapatan-dapatan Pendaftar dan menolak rayuan perayu. Tidak berpuas hati, perayu merayu di Mahkamah Rayuan. Mahkamah Rayuan menolak rayuan, dan mencatatkan dapatan yang sama dengan Mahkamah Tinggi dan Pendaftar. Kebenaran merayu diberikan kepada perayu oleh mahkamah ini atas beberapa persoalan undang-undang. Semasa perbicaraan rayuan, walau bagaimanapun, responden membangkitkan

satu bantahan awalan bahawa rayuan ini tidak kompeten. Responden menghujahkan bahawa s. 96 Akta Mahkamah Kehakiman 1964 ('AMK') mengehadkan bidang kuasa rayuan Mahkamah Persekutuan pada perkara-perkara yang diputuskan oleh Mahkamah Tinggi dalam pelaksanaan bidang kuasa asalnya. Responden seterusnya menghujahkan bahawa ACP memberikan bidang kuasa rayuan pada Mahkamah Tinggi, dengan prosedur rayuan seperti yang diperuntukkan oleh A. 55A Kaedah-Kaedah Mahkamah 2012 ('KKM'). Oleh itu, responden menghujahkan, oleh kerana rayuan ini tidak berasal dari keputusan Mahkamah Tinggi dalam bidang kuasa asalnya, rayuan berada di luar skop s. 96 AMK dan harus ditolak *in limine*. Perayu pula membalas dengan hujahan bahawa Mahkamah Tinggi yang memutuskan rayuan terhadap keputusan Pendaftar telah melaksanakannya dalam bidang kuasa asal. Hujahan utama perayu adalah terma 'rayuan' dalam ACP tidak konklusif berkenaan sifat prosiding undang-undang; sebaliknya, adalah peruntukan substantif statut yang menjadi penentu. Perayu dengan itu menghujahkan bahawa rayuan ini adalah kompeten. Isu utama yang timbul untuk diputuskan adalah sama ada Mahkamah Tinggi, dalam melaksanakan kuasanya bawah ss. 28(5), (6) dan (7) ACP bertindak dalam bidang kuasa asalnya atau bidang kuasa rayuannya.

Diputuskan (menolak rayuan dengan kos)

Oleh Raus Sharif KHN menyampaikan penghakiman mahkamah:

(1) Isu dalam kes ini bukanlah sama ada pihak yang terkilan oleh keputusan tribunal pentadbiran atau bawahan mempunyai hak untuk merayu; soalannya adalah sama ada pihak yang terkilan mempunyai hak merayu sehingga ke Mahkamah Persekutuan. Ternyata bahawa hak perayu adalah ciptaan statut; 'melainkan satu pihak terkilan boleh membawa dirinya dalam syarat peruntukan statutori untuk membolehkannya merayu, tiada rayuan akan dibenarkan.' Ia demi kepentingan pihak-pihak dan masyarakat secara keseluruhan bahawa harus terdapat had pada litigasi. Peringkat rayuan yang tersedia kepada pihak terkilan dalam sesuatu kes mewakili keseimbangan antara syarat-syarat bersaing keadilan dalam memutuskan pertikaian dan kemuktamadan litigasi.

(2) Seksyen 96(a) menetapkan beberapa keadaan berasingan agar penghakiman atau perintah Mahkamah Rayuan boleh dirayu kepada Mahkamah Persekutuan iaitu Mahkamah Tinggi telah memutuskan sebab atau perkara 'dalam pelaksanaan bidang kuasa asalnya'. Jika statut relevan tidak menyatakan tentang hak merayu kepada Mahkamah Persekutuan, jika perkara itu diputuskan oleh Mahkamah Tinggi dalam bidang kuasa rayuannya, perkara itu berakhir di Mahkamah Rayuan dan tiada rayuan selanjutnya di mahkamah ini.

(3) Sifat bidang kuasa yang dilaksanakan oleh Mahkamah Tinggi dalam memutuskan rayuan daripada tribunal harus diputuskan melalui rujukan kepada statut yang relevan. Bidang kuasa Mahkamah Tinggi bergantung pada sifat fungsi penghakiman yang dilaksanakannya. Prosiding pembantahan di hadapan Pendaftar dibawa oleh perayu menurut s. 28 ACP. Subseksyen 28(5), (6) dan (7) ACP memperuntukkan hak dan cara rayuan kepada Mahkamah Tinggi. Dalam mendengar rayuan daripada keputusan Pendaftar bawah s. 28, Mahkamah Tinggi tidak mengambil tahu perkara itu dan menentukan pertikaian itu di mahkamah pemula. Sebaliknya, peruntukan s. 28 menunjukkan bahawa rayuan di Mahkamah Tinggi adalah perbicaraan semula perkara asal di hadapan Pendaftar. Mahkamah Tinggi diberikan kuasa untuk meneliti merit-merit kes, membetulkan kekhilafan dalam keputusan Pendaftar dan membuat perintah-perintah yang harus dibuat di mahkamah pemula.

(4) Nyata sekali, bawah s. 28(7) ACP, pihak-pihak tidak boleh mengemukakan material-material selanjutnya atau alasan tambahan bantahan, yang tidak dibangkitkan dalam prosiding di hadapan Pendaftar, apabila merayu kepada Mahkamah Tinggi tanpa kebenaran mahkamah. Sekatan ini menunjukkan bahawa rayuan di hadapan Mahkamah Tinggi adalah sambungan prosiding bantahan, di mana peranan Mahkamah Tinggi adalah untuk menentukan sama ada keputusan Pendaftar betul terutamanya berdasarkan pada material-material dan alasan-alasan yang tersedia di hadapan Pendaftar.

(5) Fakta bahawa s. 69 ACP menyerahkan kepada Mahkamah Tinggi kuasa budi bicara yang sama seperti Pendaftar dalam menentukan rayuan adalah secara keseluruhannya konsisten dengan bidang kuasa rayuan. Tambahan, dalam mendengar rayuan daripada keputusan Pendaftar, Mahkamah Tinggi dalam melaksanakan kuasa-kuasa Pendaftar menurut s. 67 ACP akan bertindak dalam bidang kuasa rayuannya. Pelaksanaan kuasa s. 67 Mahkamah Tinggi adalah bersampingan dengan dan saling berkaitan rayuan bagi membentukkan sebahagian daripada bidang kuasa rayuan. Dari pandangan mahkamah ini, sifat peranan Mahkamah Tinggi bawah s. 28 ACP tidak mempunyai ciri-ciri bidang kuasa asal, tetapi sebaliknya mempamerkan ciri-ciri bidang kuasa rayuan.

(6) Adalah mantap bahawa perkataan-perkataan yang digunakan dalam statut mengisytiharkan niat Parlimen; di mana perkataan-perkataan adalah jelas, mahkamah terikat untuk memberikan kesan kepadanya. Perkataan 'rayuan' digunakan dengan secara konsisten dalam ACP bagi menggambarkan perbicaraan di hadapan Mahkamah Tinggi yang timbul daripada keputusan Pendaftar. Pada bacaan biasa dan semula jadi, rujukan kepada 'rayuan' menunjukkan sifat perbicaraan di hadapan Mahkamah Tinggi adalah satu pelaksanaan bidang kuasa rayuan. Untuk

membaca perkataan 'rayuan' untuk bermaksud bukan rayuan dalam erti kata semula jadi, tetapi satu pelaksanaan bidang kuasa asal mahkamah, adalah terlalu menapis konstruksinya. Dalam konteks ACP, maksud perkataan 'rayuan' adalah konsisten dengan sifat substantif bidang kuasa rayuan yang dilaksanakan oleh Mahkamah Tinggi bawah s. 28.

(7) Berdasarkan analisis mahkamah ini berkenaan sifat bidang kuasa Mahkamah Tinggi bawah s. 28 ACP, yang disokong oleh bacaan jelas dan semula jadi bahasa statutori, Mahkamah Tinggi melaksanakan bidang kuasa rayuannya dalam mendengar rayuan daripada keputusan Pendaftar bawah s. 28 ACP. Oleh kerana perkara ini tidak diputuskan oleh Mahkamah Tinggi dalam pelaksanaan bidang kuasa asalnya, rayuan ini tidak memenuhi syarat-syarat statutori untuk rayuan ke mahkamah ini bawah s. 96(a) AMK. Perkara ini berakhir di Mahkamah Rayuan dan tiada rayuan selanjutnya ke mahkamah ini.

Case(s) referred to:

Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor [2008] 5 CLJ 1 FC ***(refd)***

Abdul Halim Mohyiddin v. Malaysian Institute of Accountants (MIA) [2001] 5 CLJ 541 HC ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Ang Cheng Hai & Ors v. PP [1995] 3 SLR 201 ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 FC ***(refd)***

Bachoo Mohan Singh v. PP [2010] 1 SLR 966 ***(refd)***

Citiwall Safety Glass Pte Ltd v. Mansource Interior Pte Ltd [2014] SGCA 61 ***(refd)***

Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of The Sabah Foundation & Ors [1999] 1 CLJ 325 FC ***(refd)***

Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty Ltd [1959] 101 CLR 652 ***(refd)***

Farrell v. Alexander [1976] 2 All ER 721 ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***

Generation Products Sdn Bhd v Majlis Perbandaran Klang [2008] 5 CLJ 417 FC ***(refd)***

Gurbachan Singh v. PP [1967] 1 LNS 50 FC ***(refd)***

In re Greendale Developments Ltd (in liquidation) Ltd (No 3) [2000] 2 IR 514 ***(refd)***

Jafferjee v. Scarlett [1937] 57 CLR 115 ***(refd)***

Kemper Reinsurance Co v. Minister of Finance and Others [1998] 3 LRC 633 ***(refd)***

Kiew Ah Cheng David v. PP [2007] 1 SLR 1188 ***(refd)***

Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v. Kumar Gurusamy [2011] 3 CLJ 241 FC ***(foll)***

Kulasingam v. PP [1978] 1 LNS 83 FC ***(refd)***

Lam Kong Co Ltd v. Thong Guan Co Pte Ltd [2000] 3 CLJ 769 FC ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***

Lee Soo Chuan v. Lai Ah Yan & Anor [1972] 1 LNS 69 FC ***(refd)***

Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd [2014] 3 CLJ 421 FC ***(refd)***
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputera (Malaysia) Bhd [2002] 1 CLJ 645 FC ***(refd)***
Mickelberg & Anor v. R [1990] LRC Crim 70 ***(refd)***
Munusamy v. Subramaniam & Ors [1969] 1 LNS 112 HC ***(refd)***
Ng Chye Huey v. PP [2007] SGCA 3 ***(refd)***
P v. P [2002] 1 IR 219 ***(refd)***
Podbery v. Peak & Anor [1981] 1 All ER 699 ***(refd)***
Poletti v. Deputy Commissioner of Taxation [1994] 124 ALR 373 ***(refd)***
PP v. Tan Tatt Eek [2005] 1 CLJ 713 FC ***(refd)***
R v. Cambridge University, ex parte Bentley (1723) 1 Stra 557 ***(refd)***
R (Cart) v. Upper Tribunal [2011] UKSC 28 ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Registrar Of Trade Marks v. Woolworths Ltd [1999] 45 IPR 411 ***(refd)***
Ruhani v. Director General of Police [2005] 219 ALR 199 ***(refd)***
Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201 FC ***(refd)***
Siow Chung Peng v. PP [2014] 6 CLJ 423 FC ***(refd)***
Stokes (on behalf of John Stokes a minor) v. Christian Brothers High School Clonmel [2015] IESC 13 ***(refd)***
Sundaram v. Chew Choo Khoon [1968] 1 LNS 149 HC ***(refd)***
Sussex Peerage Case [1844] 11 C1 & F 85 ***(refd)***
Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565 FC ***(refd)***
Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor And Other Applications [2011] 1 CLJ 51 FC ***(refd)***
Tio Chee Hing v. United Overseas Bank (Malaysia) Bhd [2013] 2 CLJ 910 FC ***(foll)***
Valley Beef Co-Operative Ltd v. Farm Credit Corp [2002] S J No 499 ***(refd)***
Wong Hong Toy v. PP (No 2) [1994] 2 SLR 396 ***(refd)***
Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang, Malaysia (Interested Party) [2011] 7 CLJ 401 FC ***(refd)***

Legislation referred to:
Co-operative Societies Act 1993, s. 83(7)
Courts of Judicature Act 1964, ss. 3, 22, 23(2), 24, 25, 25A, 27, 35, 69, 87, 96(a)
Federal Constitution, arts. 121(2)(a), 128(3)
Interpretation Acts 1948 and 1967, s. 16
Land Ordinance (Sabah) (Cap 68), s. 41
Legal Profession Act 1976, s. 103E(1), (5)
Rules of Court 2012, O. 55A, O. 87 rr. 2, 3
Trade Marks Act 1976, ss. 3, 14, 19, 28(5), (6), (7), 45, 46, 56(15), 67, 69
Supreme Court of Judicature Act [Sing], ss. 18(2), 29A(2), First Schedule item 10

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FAR Bennion, *Bennion on Statutory Interpretation,* 5th edn, LexisNexis: 2008, p 745
JH Baker, *An Introduction to English Legal History,* 2nd edn. (London: Butterworths, 1979), p 116
W J V Windeyer, *Lectures on Legal History,* 2nd edn revised, *Australia: the Law Book Company of Australia,* 1957, p 286

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For the respondent - Arun Kasi; M/s Esther Ong Tengku Saiful & Sree

[Editor's note: For the Court of Appeal judgment, please see Merck KGaA v. Leno Marketing (M) Sdn Bhd; Registrar Of Trade Marks (Interested Party) [2017] 1 LNS 1006 (affirmed).]

B *Reported by Suhainah Wahiduddin*

JUDGMENT

Md Raus Sharif CJ:

C **Introduction**

[1] The appellant challenged the registration of the respondent's trade mark in opposition proceedings before the Registrar of Trade Marks ("the Registrar"). The Registrar dismissed the appellant's opposition and allowed the registration of the respondent's trade mark. The appellant appealed against the decision of the Registrar to the High Court.

[2] On 22 January 2016, the High Court dismissed the appellant's appeal. Upon further appeal, the Court of Appeal on 7 November 2016 affirmed the decision of the High Court.

E **[3]** Leave to appeal was granted to the appellant by this court on 15 March 2017 for the following questions of law:

(i) whether the High Court in exercising its powers under s. 28(5), (6) and (7) of the Trade Marks Act 1976 ("TMA") is acting in its original jurisdiction or appellate jurisdiction? (question 1)

F

(ii) whether as a matter of law a lower or reduced standard should be applied for determining similarity or likelihood of confusion in cases involving pharmaceutical and medicinal products under ss. 14 and 19 of the TMA? (question 2)

G (iii) whether the Registrar of Trade Marks in exercising the powers under ss. 14 and 19 of the TMA to determine similarity and likelihood of confusion for purposes of registration of a new mark is obliged to consider the public interest where the goods involved are pharmaceutical and medicinal products? (question 3)

H (iv) where the existing registered trade mark (BION) is an invented name whether it is incumbent on the applicant for registration of the new mark (BIONEL) to justify the choice of name bearing aural and conceptual similarity to the existing mark? (question 4)

I

[4] At the hearing of this appeal, the respondent raised the preliminary objection that the present appeal before this court was not competent. As a result, we directed parties to confine their oral submissions to question 1, being the threshold question of jurisdiction, before we hear further submissions on the remaining questions. This is our decision on the jurisdiction of this court to hear the present appeal.

Material Facts

[5] The appellant (the plaintiff in the High Court) is an international pharmaceutical company based in Germany. In Malaysia, the appellant is the registered owner of the trade marks "BION" and "BION 3" in Classes 5, 29 and 30.

[6] On 18 July 2008, the respondent (the defendant in the High Court) applied *vide* application No. 08014118 to register the trade mark "Bionel" in Class 5 for goods of 'pharmaceutical, veterinary and sanitary substance; infants' and fat and invalids' foods; plasters, materials for bandaging, materials for stopping teeth, dental wax; all included in Class 5'. The Registrar accepted the respondent's application.

[7] Upon the publication of the respondent's application in the *Gazette*, the appellant filed a notice of opposition before the Registrar under s. 28 of the TMA. The main grounds of the appellant's opposition were that the respondent's mark was confusingly or deceptively similar to the appellant's mark, and that the registration would likely deceive or cause confusion amongst the public. On 13 April 2015, having heard the parties, the Registrar dismissed the appellant's opposition and accordingly registered the respondent's trade mark.

[8] The appellant appealed against the decision of the Registrar to the High Court pursuant to ss. 28(5) and 28(6) of the TMA. On 22 January 2016, the High Court agreed with the findings of the Registrar and dismissed the appellant's appeal.

[9] Dissatisfied, the appellant appealed to the Court of Appeal. On 7 November 2016, the Court of Appeal dismissed the appeal, noting the concurrent findings of the High Court and the Registrar.

Submissions

[10] As stated earlier, counsel for the respondent raised a preliminary objection in respect of the competence of the present appeal. In brief, the respondent submitted that s. 96 of the CJA limits the appellate jurisdiction of the Federal Court to matters decided by the High Court in the exercise of its original jurisdiction. However, it was contended that the CJA is not the only source of the original and appellate jurisdiction of the High Court; various statutes confer original jurisdiction on the High Court, or confer original jurisdiction on some tribunal and appellate jurisdiction on the High Court.

[11] It was contended for the respondent that the TMA confers appellate jurisdiction on the High Court, with an appeal procedure as provided for in O. 55A of the Rules of Court 2012. The respondent relies on the case of *Tio Chee Hing v. United Overseas Bank (Malaysia) Bhd* [2013] 2 CLJ 910; [2013] 3 MLJ 212, wherein this court held that the High Court, in hearing an appeal from the decision of the Director of Lands and Surveys under the Sabah Land Ordinance, was exercising its appellate jurisdiction. Thus, it was argued by the respondent that since the present appeal did not emanate from a decision of the High Court in its original jurisdiction, the appeal lies outside the scope of s. 96 of the CJA and must be dismissed *in limine*.

[12] In response, counsel for the appellant submitted that the High Court deciding on an appeal from the decision of the Registrar is exercising original jurisdiction. The crux of the appellant's contention is that the term "appeal" in the TMA is not conclusive of the nature of the legal proceedings; rather, it is the substantive provisions of the statute that are determinative. It was contended that there is no presumption that the term "appeal" is to be treated as an exercise of appellate jurisdiction by the High Court. With reference to the CJA, the appellant argued that s. 27 under the chapter heading of "appellate jurisdiction" restricts the appellate jurisdiction of the High Court to appeals from subordinate courts, whereas s. 23 under the heading "original jurisdiction" suggests that any other jurisdiction vested in the High Court by written law constitutes original jurisdiction.

[13] According to the appellant, this court in *Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang, Malaysia (Interested Party)* [2011] 7 CLJ 401; [2011] 5 MLJ 629 has settled the point that the High Court exercises an original jurisdiction in hearing appeals from the Registrar under the TMA. The appellant argued that other cases including *Tio Chee Hing (supra)*, in which the High Court was held to exercise an appellate jurisdiction in hearing appeals from tribunals, were distinguishable based on the specific provisions of the relevant statutes.

[14] Unlike the statutes in those cases, it was highlighted that the TMA does not expressly provide that the right of appeal to the High Court would be in its appellate jurisdiction, or that the rules of procedure for appeals from subordinate courts were to apply. On the contrary, the appellant submitted that the following provisions in the TMA are indicative of the High Court's original jurisdiction in hearing appeals from the Registrar: the rules committee may make rules to regulate such proceedings in the High Court; the High Court may exercise all the discretionary powers conferred upon the Registrar; and the High Court may if required hear the parties and the Registrar.

[15] The test for original jurisdiction, the appellant submitted, is whether the proceeding is the origination of the process in the court for a judicial determination for the first time. Relying on Australian authorities, the appellant contended that "appeals" from administrative decisions are not appeals in the strict sense, but lie in the original jurisdiction of the court. Noting the similarity between the trade marks appeal systems in Malaysia and Australia, the appellant further argued that Australian courts have held that the High Court acts in its original jurisdiction in hearing appeals from the Registrar of trade marks. The appellant thus submitted that the present appeal is competent.

Right Of Appeal To The Federal Court

General Principles

[16] In modern judicial systems that acknowledge the need for redress for the mistakes of judges, the right of appeal has come to be regarded as an essential requirement of natural justice (JH Baker, *An Introduction to English legal History*, 2nd edn. (London: Butterworths, 1979) at 116). As long ago as 1723 it was described as a "glory and happiness" of the English constitution "that to prevent any injustice no man is concluded by the first judgment; but that if he apprehends himself to be aggrieved he has another court to which he can resort for relief" (*R v. Cambridge University, ex parte Bentley* (1723) 1 Stra 557 at 565).

[17] However, the issue in the present case is not whether a party aggrieved by the decision of an administrative or inferior tribunal has a right to appeal at all; the question is whether the aggrieved party has the right to appeal all the way up to the Federal Court. In other words, how many bites of the cherry should a party be allowed in challenging the decision of the tribunal? As Lady Hale remarked in *R (Cart) v. Upper Tribunal* [2011] UKSC 28 at [56]:

> … no system of decision-making is perfect or infallible. There is always the possibility that a judge at any level will get it wrong. Clearly there should always be the possibility that another judge can look at the case and check for error … But it is not obvious that there should be a right to any particular number of further checks after that.

[18] It is trite that the right of appeal is a creature of statute: "unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies" (*Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485; [1995] 2 MLJ 549 at 553). Unless a statute so provides, there is no inherent right of appeal (*Kulasingam v. Public Prosecutor* [1978] 1 LNS 83; [1978] 2 MLJ 243 at 244). Statutes conferring, restricting, or denying the right of appeal reflect legislative policy choices in determining the number of times a litigant may require the same question to be decided, and the point at which proceedings should be considered final (*Kemper*

A *Reinsurance Co v. Minister of Finance and Others* [1998] 3 LRC 633 at 642; *Valley Beef Co-Operative Ltd v. Farm Credit Corp* [2002] S J No 499 at [48]; *P v. P* [2002] 1 IR 219).

[19] It is in the interest of the parties and the community as a whole that there must be some limit to litigation: interest *rei publicae ut sit finis litium* (*Stokes (on behalf of John Stokes a minor) v. Christian Brothers High School Clonmel* [2015] IESC 13 at [16]; see also *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 at 200). The importance of ensuring finality in appeals was underlined by Hamilton CJ in the Irish case of *In re Greendale Developments Ltd (in liquidation) Ltd (No 3)* [2000] 2 IR 514:

> ... the finality of proceedings both at the level of trial and possibly more particularly at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law, and should not lightly be breached.

[20] The levels of appeal available to an aggrieved party in a particular case represent the balance between the competing requirements of justice in determining the dispute and finality in litigation. Lord Dyson's views expressed in his lecture entitled "Time to Call it a Day: Some Reflections on Finality and the Law" (delivered on 14 October 2011 at Edinburgh University) are illuminating in this regard:

> The balance between access to justice and the need for finality is struck in different ways in different contexts. Parliament has intervened in some areas; the common law has set the parameters in others. Special situations call for special treatment ... But generally speaking the golden thread that pervades throughout is the quest for fairness and justice. That is a constant. Views change over time as to how the demands of fairness and justice can best be met and how the balance should be struck.

The Scheme In Malaysia

[21] The starting point in determining the appellate jurisdiction of the Federal Court is the Federal Constitution. Article 121(2)(a) provides that:

> (2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Federal Court shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof; …

[22] Article 121(2)(a) does not confer an unlimited right of appeal to the Federal Court. The general empowering provision in art. 121(2)(a) must be read in tandem with art. 128(3) (*Gurbachan Singh v. Public Prosecutor* [1967] 1 LNS 50; [1967] 2 MLJ 220 at 220; *Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputera (M) Bhd* [2002] 1 CLJ 645 at 661; [2002] 1 MLJ 385 at 399). Article 128(3) states:

> The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such **as may be provided by federal law**. (emphasis added)

[23] The balance between ensuring justice and finality in litigation has been struck by Parliament in Federal laws for the establishment of various tribunals, with a spectrum of different provisions for challenging the tribunals' decisions. For ease of exposition, in considering whether an appeal lies to the Federal Court, the laws relating to tribunals can be broadly categorised into three types.

[24] The first type consists of statutes which expressly provide the right of appeal from the decision of the tribunal to the High Court, the Court of Appeal, and the Federal Court. One example is the Legal Profession Act 1976. Section 103E(1) allows any party aggrieved by the decision of the Disciplinary Board to appeal to the High Court, and s. 103E(5) goes on to provide that "any appeal against the decision of the High Court shall lie to the Court of Appeal and thereafter to the Federal Court".

[25] For the purposes of art. 128(3), statutes of the first type are "Federal law" which provide for the appellate jurisdiction of the Federal Court. Where such statutes apply, s. 96 of the CJA is of no application, and an appeal lies to the Federal Court as of right subject to the terms of the statute.

[26] The second type consists of statutes which provide for recourse to the High Court against the decision of the tribunal, but is silent on whether any further appeal lies to the Federal Court. The recourse to the High Court may be framed in various ways, for instance by way of case stated, application, or appeal. The Sabah Land Ordinance (Cap 68) is an example: s. 41 thereof states that an appeal shall lie from the decision of the Director of Lands and Surveys to the High Court.

[27] In respect of statutes of the second type, the relevant Federal law which determines whether a subsequent appeal lies to the Federal Court is s. 96(a) of the CJA. For the Federal Court to be seised of jurisdiction to hear the appeal, as will be elaborated below, one of the conditions under s. 96(a) is that the cause or matter was decided by the High Court in the exercise of its original jurisdiction.

[28] The third type consists of statutes which do not expressly provide for any right of appeal to the court against the decision of the tribunal. One such example is the Consumer Protection Act 1999, which does not make provision for an appeal against an award made by the Tribunal for Consumer Claims.

[29] In relation to statutes of the third type, since the right of appeal is not inherent but a creature of statute, no appeal lies to the court (*Kulasingam v. Public Prosecutor* [1978] 1 LNS 83; [1978] 2 MLJ 243 at 244; *Auto Dunia Sdn Bhd v. Wong Sai Fatt* [1995] 3 CLJ 485; [1995] 2 MLJ 549 at 553). However, the High Court has an inherent supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, or other bodies or persons who carry out *quasi*-judicial functions or who are charged with the performance of public acts and duties (*R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 at 191; *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145 at [6]).

[30] For decisions made by tribunals under the third type of statutes, the recourse for the aggrieved party is to invoke the supervisory jurisdiction of the High Court and challenge the decision of the tribunal by way of judicial review. Given that the supervisory jurisdiction of the High Court has been held to be a form of original jurisdiction (*Tan Sri Eric Chia Eng Hock v. PP* [2007] 1 CLJ 565; [2007] 2 MLJ 101 at [10]), the condition in s. 96(a) of the CJA is met, and the aggrieved party may subsequently bring an appeal to the Federal Court.

[31] The TMA, in particular s. 28 thereof, falls within the second type described above. Our decision on question 1 concerns the application of the test in s. 96(a) of the CJA to statutes of the second type.

The Test

[32] The conditions for an appeal to lie to the Federal Court are stipulated in s. 96 of the CJA:

> **96. Conditions of appeal**
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal **in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction** involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision. (emphasis added)

[33] It is clear that s. 96(a) stipulates a number of discrete conditions for a judgment or order of the Court of Appeal to be appealable to the Federal Court:

(i) the judgment or order must be "in respect of" a civil cause or matter decided by the High Court (see *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769; [2000] 4 MLJ 1);

(ii) the cause or matter must be "decided" by the High Court (see *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485; [1995] 2 MLJ 549);

(iii) the High Court must have decided the cause or matter "in the exercise of its original jurisdiction" (see *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor And Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25); and

(iv) it must involve "a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage" (see *Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 CLJ 325; [1999] 1 MLJ 257).

[34] For the purposes of this appeal, we will confine our discussion to condition (iii) above, and we reserve our views in relation to the interpretation of the remaining conditions.

[35] The cause or matter must have been decided by the High Court in its original jurisdiction to fall within the scope of s. 96(a) of the CJA. Where the relevant statute is silent as to the right of appeal to the Federal Court, if the matter was decided by the High Court in its appellate jurisdiction, the matter ends at the Court of Appeal and no further appeal lies to this court (*Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1; [2008] 3 MLJ 771; *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201; [2008] 3 MLJ 753).

[36] It has been suggested that to determine whether an appeal lies to the Federal Court, it is necessary to inquire whether the tribunal whose decision is appealed against is a subordinate court (*Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang, Malaysia (Interested Party)* [2011] 7 CLJ 401; [2011] 5 MLJ 629 at [46]). This suggestion is based on s. 27 of the CJA, which states that the appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts. If the tribunal

is a subordinate court, the argument goes, then the High Court must be exercising its appellate jurisdiction in hearing the matter, thus there can be no appeal to the Federal Court.

[37] We consider that the focus on the status of the tribunal is misplaced. For the purposes of s. 96(a), the crucial test is not whether the tribunal from which an appeal lies to the High Court is a subordinate court, but whether the High Court is exercising its original jurisdiction. As lucidly explained by Chong Siew Fai CJSS in the unreported case of *Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No 08-31 of 1999(S)) (quoted in *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v. Kumar Gurusamy* [2011] 3 CLJ 241; [2011] 2 MLJ 433 at [10]):

> It is significant to note that in line with the provisions of s 96(a) of the Courts of Judicature Act 1964, the judgment sought to appeal against in our present case is the judgment of the Court of Appeal and not that of the High Court. That being the case, *the pertinent question to consider is not so much as to whether the special commissioners constituted a subordinate court or an inferior court but rather whether the judgment of the Court of Appeal sought to appeal against is in respect of a cause or matter decided by the High Court in the exercise of its original jurisdiction.* In other words, the material point is not so much the status of the Special Commissioners sitting in judgment of the assessment made by the Director General, but rather the nature of the jurisdiction exercised by the High Court when it heard an appeal from the decision of the Special Commissioners by way of case stated. (emphasis added)

[38] The same approach was followed by this court in *Koperasi Jimat Cermat (supra)* (at [16]) and *Tio Chee Hing v. United Overseas Bank (Malaysia) Bhd* [2013] 2 CLJ 910; [2013] 3 MLJ 212 ([32]-[35]). In the latter case, the approach in *Walton (supra)* was expressly discountenanced. Per Suriyadi FCJ (at [35]):

> The words in s 96(a) are unambiguous, plain and clear and thus must be given their natural and ordinary meaning. It is not for us to invent fancy ambiguities as an excuse not to give effect to its plain meaning or twist and stretch the language beyond its common usage (*Public Prosecutor v. Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; *Tan Weng Chiang v. Public Prosecutor* [1992] 2 MLJ 625; *Cheong Seok Leng v. Public Prosecutor* [1988] 2 MLJ 481). We agree with the views held by this court that, *regardless of the status of the tribunal, and in this case the director of land survey, whether it is a subordinate court or an inferior court or not, the critical issue is whether the High Court was exercising its original jurisdiction or appellate jurisdiction when hearing the matter* (*Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 MLJ 513).
>
> (emphasis added)

[39] We also observe that reliance has been placed on a number of cases to show that a particular tribunal is or is not regarded as a subordinate court, for instance the *Collector of Land the Collector of Land Revenue (Sundaram v. Chew Choo Khoon* [1968] 1 LNS 149; [1968] 2 MLJ 40), the *Senior Inspector of Mines (Lee Soo Chuan v. Lai Ah Yan & Anor* [1972] 1 LNS 69; [1972] 2 MLJ 33), and the *Malaysian Institute of Accountants (Abdul Halim Mohyiddin v. Malaysian Institute of Accountant*s (MIA) [2001] 5 CLJ 541; [2001] 5 MLJ 497). Upon examination, we find that these cases do not concern s. 96(a) of the CJA or discuss the original and appellate jurisdictions of the High Court. The common issue in these cases was purely procedural, namely whether the procedure to be applied for appeals to the High Court from those tribunals should be the same as that for appeals from subordinate courts. As such, we are of the view that this line of authorities lends little if any support to the proper test to be applied under s. 96(a) of the CJA.

[40] In order to examine the nature of the jurisdiction exercised by the High Court in hearing an appeal against the Registrar's decision, it is necessary to first consider the scope and meaning of "original jurisdiction" and "appellate jurisdiction".

Original Jurisdiction

[41] Under the heading "original jurisdiction", s. 23 of the CJA provides:

> Civil jurisdiction-general
>
> 23(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and **such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.**

(emphasis added)

[42] Section 24 provides for the specific instances where the High Court has civil jurisdiction. Appeals from the decision of the Registrar or other tribunals are not listed as one of the specific instances in s. 24.

Effect Of s. 23(2) CJA

[43] The appellant contended that pursuant to s. 23(2), the original jurisdiction of the High Court encompasses any other jurisdiction vested in it by written law. It was argued that the TMA is a written law, thus it must follow that the jurisdiction vested in the High Court to hear appeals under the TMA is an original jurisdiction.

[44] We note that the wording of s. 23(2) does not refer to "original jurisdiction", nor does it describe the nature of "such other jurisdiction as may be vested". The suggestion that the jurisdiction referred to in s. 23(2) is original jurisdiction is based on the heading for ss. 22-25A, which reads "original jurisdiction".

[45] The function of headings and their proper role in statutory interpretation is as explained in *FAR Bennion, Bennion on Statutory Interpretation*, 5th edn. (LexisNexis: 2008) at p. 745:

> A heading within an Act, whether contained in the body of the Act or a Schedule, is part of the Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the material to which it is attached.

[46] While courts are required to take notice of the division of an Act into parts and chapters (s. 16 of the Interpretation Acts 1948 and 1967), "a heading is of very limited use in interpretation because of its necessarily brief and inaccurate nature" (*Bennion (supra)* at p. 746).

[47] The case of *Tan Sri Eric Chia Eng Hock v. PP* [2007] 1 CLJ 565; [2007] 2 MLJ 101 is an example which illustrates the non-conclusive nature of a heading in the CJA. In that case, Richard Malanjum CJ Sabah & Sarawak ([10], [15]-[16]) held that the supervisory and revisionary jurisdictions of the High Court were distinct. The fact that s. 35 (general supervisory and revisionary powers of the High Court) is housed under the heading "Revision" did not mean that the High Court's supervisory jurisdiction is equated to its jurisdiction for revision. Further, even though s. 35 is not placed under the heading "original jurisdiction", it was held that the inherent supervisory jurisdiction of the High Court is in fact a form of original jurisdiction.

[48] The Singapore Supreme Courts of Judicature Act ("SCJA") is substantially similar in structure and content to the CJA in relation to the jurisdiction of the High Court, with equipollent provisions also housed under the separate headings "original jurisdiction", "appellate jurisdiction" and "Revision" (prior to the amendment in 2010). The Singaporean equivalent to our s. 35 CJA was also grouped under the heading "revision". Notwithstanding the common heading, the Singapore Court of Appeal in *Ng Chye Huey v. Public Prosecutor* [2007] SGCA 3 (at 42-53) likewise held that the High Court's supervisory and revisionary jurisdictions are separate and should not be conflated.

[49] The case of *Ang Cheng Hai & Ors v. Public Prosecutor* [1995] 3 SLR 201 is another useful illustration. Section 18(2) of the SCJA, housed under the heading "original jurisdiction", provides that:

> Without prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule.

[50] The High Court's power to transfer any proceedings to or from any subordinate court is listed in item 10 of the First Schedule to the SCJA. However, the Singapore Court of Appeal rejected the argument that the High Court order to transfer proceedings can be inferred as an exercise of its original jurisdiction by virtue of the heading "original jurisdiction". On the contrary, based on a consideration of the facts, it was held that the High Court was not in fact exercising original jurisdiction.

[51] In view of the above authorities, we consider that while headings are generally a permissible guide to interpretation, they may not necessarily be conclusive and admit of no exception in all cases. Thus, we do not agree with the broad proposition that the placement of s. 23(2) under the heading "original jurisdiction" necessarily means any other jurisdiction conferred on the High Court by written law must be original jurisdiction. The Income Tax Act 1967 is a clear counter-example: it is a written law which expressly provides that the decisions of the High Court, in hearing cases stated arising from the decision of the Special Commissioners of Income Tax, are made "in its appellate civil jurisdiction".

Meaning Of Original Jurisdiction

[52] The original and appellate jurisdictions of the High Court in its present form can be loosely traced to the "instance jurisdiction" and the "jurisdiction in error" of the Court of King's Bench in England, prior to the establishment of a unified High Court of Justice in England in 1873. The "instance" jurisdiction, or the jurisdiction of first instance, is that of hearing the case for the first time as distinct from hearing it on appeal; whereas the appellate jurisdiction consisted of the power to correct errors or to direct that justice

had not been done, either by way of a writ of error or a motion for a new trial (A K R Kiralfy, *Potter's Historical Introduction to English Law and its Institutions*, 4th edn (London: Sweet & Maxwell, 1962) at 125, 127).

[53] The Supreme Court of Judicature Act 1873 abolished the existing courts and established a single Supreme Court of Judicature, composed of two divisions: the High Court of Justice, and the Court of Appeal. The Act conferred upon the High Court of Justice "original jurisdiction", being the jurisdiction at first instance of all the old courts abolished by the Act; and upon the Court of Appeal the appellate jurisdiction formerly exercised by the Chancellor, the Court of Appeal in Chancery, the Exchequer Chamber, and the Privy Council (W J V Windeyer, *Lectures on Legal History*, 2nd edn (revised) (Australia: the *Law Book Company of Australia*, 1957) at 286).

[54] A detailed account of the history of the Malaysian High Court was given by Abdul Hamid J (as he then was) in *Munusamy v. Subramaniam & Ors* [1969] 1 LNS 112; [1969] 2 MLJ 108. The Courts Ordinance 1948, the predecessor to the CJA, provided for the original civil jurisdiction of the High Court in s. 47 thereof:

> The original civil jurisdiction of the High Court shall be as set out in the Second Schedule hereto.

[55] The effect of s. 47 of the Courts Ordinance 1948 was "abundantly clear". In *Lee Lee Cheng v. Seow Peng Kwang* [1960] 1 MLJ 1, Thomson CJ interpreted the provision as follows:

> In my view it does nothing more than set out what portion of the sum total of the jurisdiction of the Supreme Court is to be **exercised originally by the High Court, that is to say, by the High Court as a Court of first instance.** (emphasis added)

[56] It is evident that the term "original jurisdiction" has been historically understood to mean the jurisdiction to hear a case as a court of first instance. The definition of "original jurisdiction" in *Black's Law Dictionary* was adopted by the Singapore Court of Appeal in *Ang Cheng Hai (supra)* at 206:

> The concept of 'original jurisdiction' has been defined to mean 'jurisdiction to consider a case in the first instance … to take cognizance of a cause at its inception, try it and pass judgment upon the law and facts': *Black's Law Dictionary* (6th edn).

[57] Similarly, this court in *Tio Chee Hing v. United Overseas Bank (M) Bhd* [2013] 3 CLJ 910; [2013] 3 MLJ 212 at [17] described original jurisdiction as "the jurisdiction to entertain cases in the first instance".

[58] Guidance may be gleaned from cases in respect of the High Court's original criminal jurisdiction. The original criminal jurisdiction of the High Court is stipulated in s. 22 of the CJA, which opens with the words "the High Court shall have jurisdiction to try (offences)". This is similar to the formulation in s. 23(1), which states "the High Court shall have jurisdiction to try all civil proceedings". In *Siow Chung Peng v. PP* [2014] 6 CLJ 423; [2014] 4 MLJ 504, it was stressed that original jurisdiction "is not whatever that is not appellate or revisionary" (at [7]). As articulated by Jeffrey Tan FCJ (at [20]):

> *Under the CJA, 'original criminal jurisdiction' is the jurisdiction to try offences, with s. 30 of the CJA as the exception. The key words in s. 22(1) of the CJA are 'jurisdiction to try*'. In the instant case, that jurisdiction to try the offence was entrusted to the sessions court. Since the High Court was not the trial court trying the offence and there was no provision to permit an appeal of a criminal matter that emanated from a subordinate court to the Federal Court, this application for leave to appeal, beside being unknown in law and so could not, may never, be granted in any event, was an absolute non-starter.
>
> (emphasis added)

[59] Similar to s. 87 of the CJA, in Singapore, s. 29A(2) of the SCJA restricts criminal appeals to the apex court to decisions "made by the High Court in the exercise of its original criminal jurisdiction. In *Ang Cheng Hai (supra)*, the Singapore Court of Appeal held that the High Court hearing an application did not exercise original jurisdiction, for it had not "taken cognizance" of the offence in question.

[60] In *Kiew Ah Cheng David v. Public Prosecutor* [2007] 1 SLR 1188, Choo Han Teck J explained original jurisdiction in the following terms (at [3]):

> The distinction between an original and an appellate jurisdiction is not one that normally requires extensive elaboration. **A court exercises original jurisdiction in all proceedings at first instance.** A court exercises an appellate jurisdiction when it conducts proceedings arising from any decision of a court in the exercise of its original jurisdiction. It is only in the narrowest sense that the proceedings before the judge in Criminal Motion No 22 of 2006 can be regarded as proceedings by a judge exercising his original jurisdiction. That is plausible only because the application for an extension of time was a prayer first made before that court. It had not been adjudicated upon or made in any other court. **Original jurisdiction is a legal term and the word 'original' here does not refer only to a matter that originated from that court and had not arisen before any previous one.** (emphasis added)

[61] In that case, the Singapore Court of Appeal held that the decision of a trial judge in respect of an application for extension of time was not an exercise of original jurisdiction. The "narrowest sense" of original jurisdiction, referring to matters which have not arisen before other courts, was rejected. The interpretation of "original jurisdiction" in *Ang Cheng Hai (supra)* and *Kiew Ah Cheng (supra)* was quoted with approval more recently by the same court in *Bachoo Mohan Singh v. Public Prosecutor* [2010] 1 SLR 966.

Appellate Jurisdiction

[62] Under the heading "appellate jurisdiction", s. 27 of the CJA reads:

> **Appellate civil jurisdiction**
>
> 27. The appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts as hereinafter provided.

[63] "Subordinate court" is defined in s. 3 of the CJA. It "means any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court and means in relation to the High Court and such court as by any written law has jurisdiction within the local jurisdiction of the High Court". It should be reiterated that the crucial test under s. 96(a) of the CJA is not whether the tribunal appealed against is a subordinate court, but whether the High Court is exercising its original jurisdiction.

[64] "Appellate jurisdiction" suggests the correction of a decision (*Tio Chee Hing (supra)* at [17]). The meaning of "appellate jurisdiction" was explained in *R Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147 at 177; [1997] 1 MLJ 145 at 191:

> Where statute provides simply for an appeal, the appellate court has power to re-hear the whole case and, when satisfied that the judgment appealed against cannot stand, it may set aside the judgment and make such orders as ought to have been made at first instance. Thus, appellate jurisdiction is concerned with the merits of a case.

[65] Once the appellate court has jurisdiction to hear and determine an appeal, it may then exercise the jurisdiction of the court or tribunal whose decision is appealed against. For instance, s. 69 of the CJA provides that all appeals to the Court of Appeal shall be by way of re-hearing, and that the Court of Appeal shall have all the powers and duties of the High Court, together with full discretion to receive further evidence.

[66] In such circumstances, where the appellate court hearing an appeal exercises the jurisdiction of the court below, the appellate court is exercising its appellate jurisdiction (*Podbery v. Peak & Anor* [1981] 1 All ER 699 at 701).

[67] A similar position is adopted by the Singapore courts. In *Wong Hong Toy v. Public Prosecutor (No. 2)* [1994] 2 SLR 396 at [31], Wee Chong Jin CJ held that the application for leave before the High Court was:

> … so intertwined with the appeal that it cannot be logical to say that while the determination of the appeal is an exercise of its appellate criminal jurisdiction, the determination of the application is an exercise of the High Court's **original** jurisdiction. (emphasis added)

[68] Following *Wong Hong Toy (No. 2) (supra)*, in *Kiew Ah Cheng David (supra)*, the Singapore Court of Appeal likewise held that since the application to extend time before the High Court in that case was "intertwined with the appeal", the High Court was exercising its appellate jurisdiction in dismissing the application.

[69] This conception of appellate jurisdiction is echoed in the dissenting judgment of Deane J in the Australian High Court case of *Mickelberg & Anor v. R* [1990] LRC Crim 70. On the jurisdiction of the High Court (being the apex court) hearing an appeal from a State Court, Deane J elaborated that the question was whether the power exercised by the High Court was "an incident of the grant of appellate jurisdiction" (at 84, 89):

> … it is relevant to note **that this court exercises the powers which can be exercised in the original jurisdiction of a State court as an ordinary incident of the appellate jurisdiction** conferred by s. 73 whenever, after upholding an appeal direct from a State court of first instance and setting aside the orders below, it proceeds to make the orders which should have been (but were not) made by that State court. (emphasis added)

[70] Guided by the persuasive authorities above, we agree that the exercise of powers by an appellate court, which are "incidental to" or "intertwined with" the appeal, should be regarded as part of the exercise of its appellate jurisdiction.

Our Decision

[71] The nature of the jurisdiction exercised by the High Court in determining appeals from tribunals must be determined by reference to the relevant statute itself. The High Court's jurisdiction depends on the nature of the judicial function it exercises (*Citiwall Safety Glass Pte Ltd v. Mansource Interior Pte Ltd* [2014] SGCA 61 at [50]). The correct position was succinctly put in *Eric Chia (supra)* at [12]:

> ... to determine whether or not a particular exercise of power by the High Court is made pursuant to its original jurisdiction, it must necessarily depend on the statutory provision which governs it.

[72] The opposition proceedings before the Registrar were brought by the appellant pursuant to s. 28 of the TMA. Subsections 28(5), (6) and (7) provide for the right and manner of appeal to the High Court. For completeness of context, s. 28 is reproduced herein:

Opposition to registration

28 (1) Any person may, within the prescribed time from the date of the advertisement of an application for the registration of a trade mark, give notice to the Registrar and applicant of opposition to the registration.

(2) The notice shall be given in writing in the prescribed manner and shall include a statement of the grounds of opposition.

(3) The applicant shall, within the prescribed time after the receipt of the notice of opposition, send to the Registrar and the opponent a counter-statement, in the prescribed manner, of the grounds for his application, and, if he does not do so, he shall be deemed to have abandoned his application.

(3A) If the applicant submits a counter-statement under subsection (3), the opponent and applicant shall file evidence and exhibits in the prescribed manner and within the prescribed time in support of the opposition or the counter-statement, as the case may be, to be adduced in the prescribed manner, and if the opponent or applicant fails to do so, the opposition or application, as the case may be, shall be treated as abandoned.

(3B) If the applicant files evidence and exhibits under subsection (3A), the opponent may, within the prescribed time, send to the Registrar and applicant evidence in reply to be adduced in the prescribed manner.

(4) After considering the evidence and exhibits and after giving the applicant and the opponent an opportunity of making written submissions, the Registrar shall decide whether

(a) to refuse to register the trade mark;

(b) to register the trade mark absolutely; or

(c) to register the trade mark subject to such conditions, amendments, modifications or limitations as he may think fit.

(5) **A decision of the Registrar under subsection (4) is subject to appeal to the Court.**

(6) An appeal under this section shall be made in the prescribed manner and the Court shall, if required, hear the parties and the Registrar, and shall make an order determining whether, and subject to what conditions, amendments, modifications or limitations, if any, registration is to be permitted.

(7) On **the hearing of an appeal** under this section any party may, either in the manner prescribed or by special leave of the Court, bring forward further material for the consideration of the Court but no further grounds of objection to the registration of a trade mark shall be allowed to be taken by the opponent or the Registrar other than those stated by the opponent except by leave of the Court.

(8) Where any further grounds of objection are taken the applicant shall be entitled to withdraw his application without payment of the costs of the opponent on giving notice as prescribed.

(9) In any **appeal** under this section the Court may after hearing the Registrar, permit the trade mark proposed to be registered to be modified in any manner not substantially affecting the identity of the trade mark, but in any such case the trade mark as modified shall be advertised in the prescribed manner before being registered.

(10) If a person giving notice of opposition or an applicant sending a counter-statement after receipt of such a notice, or an appellant, neither resides nor carries on business in Malaysia, the Registrar or the Court may require him to give security for costs of the proceedings relative to the opposition, application or appeal, as the case may be, and in default of such security being duly given, may treat the opposition, application, or appeal, as the case may be, as abandoned.

(emphasis added)

[73] "Court" is defined in s. 3 of the TMA to mean the High Court. Section 67 provides for the powers of the court in hearing an appeal from the decision of the Registrar:

Discretionary power

67. In any appeal from the decision of the Registrar under this Act the Court shall have and exercise the same discretionary powers as are conferred upon the Registrar under this Act.

[74] Section 69 further states that:

Appeal from Registrar

69. Except where expressly given by the provisions of this Act or regulations made thereunder there shall be no appeal from a decision of the Registrar but the Court, in dealing with any question of the rectification of the Register (including all applications under section 45) shall have power to review any decision of the Registrar relating to the entry in question or the correction sought to be made.

Nature Of Proceedings Before The High Court

[75] In hearing an appeal from the decision of the Registrar under s. 28, the High Court does not take cognizance of the matter and determine the dispute at the first instance. On the contrary, the provisions of s. 28 indicate that the

A appeal to the High Court is a rehearing of the original cause before the Registrar. The High Court is empowered to examine the merits of the case, correct errors in the Registrar's decision, and make such orders as ought to have been made at first instance (*R Rama Chandran (supra)*).

B **[76]** Significantly, under s. 28(7) of the TMA, the parties may not introduce further materials or additional grounds of objection, not previously raised in the proceedings before the Registrar, on appeal to the High Court without the court's leave. These restrictions strongly indicate that the appeal before the High Court is a continuation of the opposition proceedings, where the role of the High Court is to determine the correctness of the Registrar's C decision based primarily on the materials and grounds then available before the Registrar.

[77] The fact that s. 69 of the TMA confers upon the High Court the same discretionary powers as the Registrar in determining the appeal is entirely consistent with its appellate jurisdiction. As noted above, s. 87 of the CJA D likewise allows the Court of Appeal, on hearing an appeal from the High Court, to exercise the powers of the High Court; it does not detract from the nature of the appellate jurisdiction exercised.

[78] Further, in hearing an appeal from the decision of the Registrar, the E High Court exercising the powers of the Registrar pursuant to s. 67 of the TMA would be acting within its appellate jurisdiction. The High Court's exercise of the s. 67 powers is incidental to, and intertwined with, the appeal so as to constitute part of the appellate jurisdiction (*Podbery (supra), Wong Hong Toy (No. 2) (supra), Kiew Ah Cheng David (supra), Mickelberg (supra)*).

F **[79]** In our view, the nature of the High Court's role under s. 28 of the TMA does not have the characteristics of original jurisdiction, but conversely displays the hallmarks of appellate jurisdiction. We now turn to consider whether the statutory language used in the TMA is consistent with the substantive nature of the jurisdiction conferred on the High Court.

G *Interpretation Of Statute*

[80] It is well-established that the words used in a statute best declare the intention of Parliament; where the words are unambiguous, the court is bound to give effect to them. Per Tindal CJ in the *Sussex Peerage Case* [1844] 11 C1 & F 85 at 143 (quoted with approval by this court in *PP v. Tan Tatt* H *Eek & Other Appeals* [2005] 1 CLJ 713 at p. 747; [2005] 2 MLJ 685 at [155]):

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver.

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[81] The principle was affirmed by this court in *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd* [2014] 3 CLJ 421; [2014] 2 MLJ 1 at [14]:

> The matter may be summarily dealt with if the language is plain and unambiguous and admits of only one meaning. In *Kamla Devi v. Takhatmal* AIR 1964 SC 859 the court remarked:
>
> > If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.

[82] The choice of words employed by the draftsman is significant. It is presumed that the draftsman employed particular words in order to convey the intention of Parliament. This was emphasised by the House of Lords in *Farrell v. Alexander* [1976] 2 All ER 721 at 735-736 (quoted with approval by this court in *Generation Products Sdn Bhd v. Majlis Perbandaran Klang* [2008] 5 CLJ 417 at [35]; [2008] 6 MLJ 325 at [41]):

> Since the draftsman will himself have endeavoured to express the parliamentary meaning by words used in the primary and most natural sense which they bear in that same context, the court's interpretation of the meaning of the statutory words used should thus coincide with what Parliament meant to say.
>
> The first or 'golden' rule is to ascertain the primary and natural sense of the statutory words in their context, since it is to be presumed that it is in this sense that the draftsman is using the words in order to convey what it is that Parliament meant to say. They will only be read in some other sense if that is necessary to obviate injustice, absurdity, anomaly or contradiction, or to prevent impediment of the statutory objective.

[83] The word "appeal" is consistently used in the TMA to describe the hearing before the High Court arising from the decision of the Registrar. On a plain and natural reading, the reference to "appeal" tend to indicate that the nature of the hearing before the High Court is an exercise of its appellate jurisdiction.

[84] In drafting the TMA, the draftsman was presumably aware of the basic distinction between the original and appellate jurisdictions of the High Court. Pertinently, this distinction is reflected in the difference in terminology used in respect of different avenues for aggrieved parties to seek redress in the High Court under the TMA. As Thomson CJ held in *Lee Lee Cheng (supra)* at 3:

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> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly.

[85] In relation to certification trade marks, s. 56(15) allows the aggrieved party to seek a remedy in the High Court by way of "application" rather than
B "appeal":

> The Court may, **on the application in the prescribed manner of any person aggrieved**, or on the application of the Registrar, make such order as it thinks fit for expunging or varying any entry in the Register, relating to a certification trade mark … (emphasis added)

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[86] Likewise, ss. 45 (rectification of the register) and 46 (provisions as to non-use of trade mark) provide a mechanism for the aggrieved person not to "appeal" but to make an "application" to the court. The distinction between applications and appeals brought to the High Court under the TMA is also reflected in O. 87 of the Rules of Court 2012, which makes specific
D provisions in respect of the TMA. Rule 2 states that "an *application* to the court under the Act shall be *begun* by originating summons", whereas r. 3 states that "an *appeal* to the court under the Act shall be *brought* by originating summons".

[87] In this context, the significance of the word "appeal" as opposed to
E "application" in sub-ss. 28(5), (6) and (7) cannot be understated. The meaning of a particular word must necessarily be interpreted *noscitur a sociis*, in its context. Nevertheless, we observe that if an application under the TMA is made to the High Court distinct from the hearing of an appeal, giving rise to matters for the High Court to take cognizance at the first instance, the High
F Court in determining the application may well be exercising its original jurisdiction (*P v. P (supra)*).

[88] In the context of the TMA, we find that the plain meaning of the word "appeal" is consistent with the substantive nature of the appellate jurisdiction exercised by the High Court under s. 28. We also find support for this
G interpretation from the case of *Koperasi Jimat Cermat (supra).* The case arose from an appeal to the High Court against a decision of the Cooperative Tribunal under s. 83(7) of the Co-operative Societies Act 1993 ("CSA"). This court took into account s. 83 of the CSA and the relevant rules of court, both of which refer to the proceedings before the High Court as an "appeal".
H As such, it was held that the matter came before the High Court as an appeal, and accordingly there was no right of appeal to the Federal Court.

[89] The same conclusion was reached in *Tio Chee Hing (supra)*, which concerned an appeal to the High Court against a decision of the Director of Lands and Surveys pursuant to s. 41 of the Sabah Land Ordinance. Having

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examined the wording of the relevant provisions, this court concluded that the High Court was exercising its appellate jurisdiction in hearing an appeal under s. 41 (at [33]):

> To fortify our view, s. 41 of the Sabah Land Ordinance (Cap 68) clearly legislates that (similar to the Income Tax Act) an appeal shall lie from any order or decision of the director, whether original or an appeal, to the court. Section 4 of this Ordinance provides that 'court' means the 'High Court'. It is succinctly legislated in s. 41 that no court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by the Sabah Land Ordinance (Cap 68) to the director. Certainly it bars the High Court from exercising an original jurisdiction thus leaving it only an appellate jurisdiction …

[90] The appellant relied heavily on the decision of this court on the same issue in *Walton (supra)*. In that case, it was held that the High Court exercises an original jurisdiction in hearing appeals from the Registrar under s. 28 of the TMA, and thus the conditions for an appeal to lie to the Federal Court in s. 96(a) of the CJA were satisfied. As stated earlier, the test in *Walton (supra)* of determining whether the Registrar is a subordinate court has since been departed from in the latter case of *Tio Chee Hing (supra)*. We would, with respect, prefer the test adopted in *Tio Chee Hing (supra)* as discussed above, based on a substantive analysis of the nature of the jurisdiction exercised by the High Court.

[91] It has been brought to our attention that the Australian courts have preferred a different approach. In *Poletti v. Deputy Commissioner of Taxation* [1994] 124 ALR 373, the Federal Court of Australia held that the terminology of appeals in a statute is not determinative of the class of jurisdiction exercised by the court and explained (at 375):

> Appeals from decisions of Commonwealth officers or federal administrative tribunals, though called appeals, are not appeals in the strict sense. The right of 'appeal' is to a court exercising the judicial power of the Commonwealth, for it is the first occasion on which a court is seized with jurisdiction to consider a matter after it has been dealt with by administrative bodies. Appeals of this kind, of which there are numerous examples (notably appeals to the Federal Court from decisions of the Administrative Appeals Tribunal (s. 44 of the Administrative Appeals Tribunal Act 1975 (Cth)) and appeals under Pt V of the Income Tax Assessment Act 1936 (Cth) directly from decisions of the Commissioner to the Federal Court), lie to the Federal Court in the exercise of its original, not appellate, jurisdiction.

[92] The Australian Trade Marks Act 1995 sets up a similar scheme to the TMA, in respect of appeals from the decision of the Registrar of Trade Marks to the Federal Court. Australian courts have consistently taken the view that the "appeal" is in fact an exercise of the original jurisdiction by the court.

In *Jafferjee v. Scarlett* [1937] 57 CLR 115 (followed in *Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty Ltd* [1959] 101 CLR 652; *Registrar Of Trade Marks v. Woolworths Ltd* [1999] 45 IPR 411), Latham CJ explained that:

> *The first question which arises is a question as to the functions of the court upon this proceeding, which is described in the Trade Marks Act, s. 45, as an appeal, though it is really an exercise of the original jurisdiction of the court.*
>
> It has been contended for the respondent that it is the duty of the Registrar to exercise a discretion upon opposition proceedings, and that the court, in determining an appeal from his decision, should regard itself as bound by the exercise of his discretion, unless it should appear that the Registrar acted upon a wrong principle, or that the decision is in some other way clearly wrong. This proposition does not accurately describe the functions of the court upon such an appeal. An appeal may be taken from the decision of the Registrar either to the Law Officer or to the court – ss. 43 and 45. Section 44 provides for an appeal from the Law Officer to the court. Section 44(2) specifies the duty of the court upon an appeal – 'The court shall hear the applicant and the opponent and determine whether the application ought to be refused or ought to be granted with or without any modification or conditions.' These words show that it is the duty of the court to decide the matter as upon an original application, and not merely to decide whether the decision of the Registrar can or cannot be supported. This is now the well-established practice of the court … (emphasis added)

[93] While the Australian approach is arguably not without merit, we are of the opinion that to read the word "appeal" to mean not an appeal in the natural sense, but in fact an exercise of the court's original jurisdiction, is an unduly strained construction. Such a strained construction may be warranted in certain circumstances, for instance where a literal reading would be in conflict with the legislative purpose, or would bring about unjust, absurd, or anomalous results. However, there is no suggestion in this case that any such circumstances exist. Further, the use of the word "appeal" in s. 28 of the TMA is an accurate reflection of the nature of the jurisdiction exercised by the High Court under that section. As elucidated by Abdoolcader SCJ in *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35 at 43:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. ...

> The provisions of the Act are abundantly clear to refute any resort to a purposive and strained construction which requires a strained meaning where the literal meaning is not in accordance with the legislative purpose.

[94] We are inclined to agree with the sentiments expressed strongly – perhaps colourfully – in the dissenting judgment of Kirby J in the High Court of Australia in *Ruhani v. Director General of Police* [2005] 219 ALR 199. Interpreting the phrase "appeals … from the Supreme Court of Nauru" in the Nauru Appeals Act, the learned judge said:

> It can scarcely be imagined that, in drafting the Bill that became the Nauru Appeals Act and in enacting it, those responsible were unaware of the distinction drawn in the Australian Constitution between the 'appellate jurisdiction' of this court and its 'original jurisdiction'. While the chosen language cannot determine conclusively the character of the jurisdiction, it would require an unreasonable alteration of the character of the jurisdiction expressed by the two legislatures to turn the language of appeals into the substance of original jurisdiction. Prudent conjuring with words is the stuff of constitutional interpretation. Magic belongs elsewhere.

Conclusion

[95] Our answer to question 1 is as follows. Based on our analysis of the nature of the High Court's jurisdiction under s. 28 of the TMA, supported by a plain and natural reading of the statutory language, we find that the High Court was exercising its appellate jurisdiction in hearing an appeal from the decision of the Registrar under s. 28 of the TMA.

[96] Since the matter was not decided by the High Court in the exercise of its original jurisdiction, the present appeal does not meet the statutory condition for an appeal to this court under s. 96(a) of the CJA. The matter ends at the Court of Appeal and no further appeal lies to this court.

[97] This is sufficient to dispose of the appeal, and there is no necessity to answer questions 2, 3 and 4. The appeal is dismissed with costs.